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Hawaii Legal Authority NPDES

Attached is a copy of Regional Counsel's most recent comparison of Hawaii Legal Authority to EPA requirements for assumption of the NPDES permit program. You will note their legal authority is not complete.

The legal review is based on the following documents which have been transmitted to this office from Hawaii, either directly or through EPA personnel:

1. Act 100
2. Amendments to Act 100 contained in 1973 Legislature "H.D. 1/S.D. 1"
3. Public Health Regulations, Chapter 37

This review was made from an "inclusive" point of view. I.e., each element listed in 40 CFR-124 as a requirement of a State program was sought to be matched with an element of Hawaiian Law, no attempt was made to examine Hawaiian Law from a point of view which inquired if elements of Hawaiian Law went beyond the requirements of Part 124 to the point where they contradicted legal requirements of that Part. This latter form of review will have to be done by the Hawaii Attorney General who should certify that Hawaiian Law does not contradict EPA requirements.

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by   
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# EVALUATION OF HAWAII LEGAL AUTHORITY FOR NPDES PURPOSES

Federal Requirement 40 CFR §	Hawaii Authority Act 100 §	Public Health Regulations Chapter 37 §	Comment
124.10	33	3	1
124.21(a)	EVALUATION OF THIS SECTION FORTHCOMING		-
(b)			-
(c)			-
124.22	3, 32	5 <sup>FN</sup> 1	2
124.23	3, 32	6 <sup>FN</sup> 1	2
124.24(a)	3, 32	7	1
(b)	3, 32	7	1
(c)	3, 32	7	1
(d)	3, 32	7	1
124.31(a)	3, 6	8 <sup>FN</sup> 1	2
(b)	3, 6	8 <sup>FN</sup> 1	2
124.32(a)	3, 32	9(a)	1
(b)	3, 32	9(b) <sup>FN</sup> 1	2
(c)	3, 32	9(c) <sup>FN</sup> 1	2
124.33(a)	3, 32	10 <sup>FN</sup> 1	2
(b)	3, 32	10 <sup>FN</sup> 1	2
124.34(a)	-	-	Not Applicable
(b)	-	-	Not Applicable
(c)	3, 32	11(a)	1
(d)	3, 32	11(b)	1
(e)	3, 32	11(c)	1
1=authority present 2=no regulation required		3=specific regulation needed 4=statutory change needed	

EVALUATION OF HAWAII LEGAL AUTHORITY FOR NPDES PURPOSES

Federal Requirement 40 CFR §	Hawaii Authority Act 100 §	Public Health Regulations Chapter 37 §	Comment
124.35(a)	3,5,32	12(a)	1
(b)	3,5,32	12(b) FN 1	2
(c)	3,5,32	12(c) FN 1	2
(d)	3,5,32	12(d) FN 1	2
124.36	3,32	13	2
124.37(a)	3,32	14(a)	1
(b)	3,32	14(b) FN 1	2
124.41(a)	33	15(c) (1)	3 FN 2
(b)	33	(2)	3 FN 2
(c)	33	(3)	3 FN 2
(d)	33	(4)	3 FN 2
124.42(a) (1)	3,32	19(a) (1)	1
(2)	3,32	(2)	1
(3)	3,32	(3)	1
(4)	3,32	(4)	1
(5)	3,32	(5)	1
(6)	3,32	(6)	1
(7)	3,32	(7)	1
(b)	3,32	19(b) FN 1	2 FN 3
124.43	3,32	20 FN 1	2
124.44	3,32	21 FN 1	2
1=authority present 2=no regulation required		3=specific regulation needed 4=statutory change needed	

# EVALUATION OF HAWAII LEGAL AUTHORITY FOR NPDES PURPOSES

Federal Requirement 40 CFR §	Hawaii Authority Act 100 §	Public Health Regulations Chapter 37 §	Comment
*124.45(a)	3,6,32	22(a)	1
(b) (1)	3,6,32	16(a) (1)	3FN 4
(2)	3,6,32	16(a) (2)	3FN 4
(3)	3,6,32	16(a) (4)	3FN 4
(c) (1)	3,10,32	22(b) (1)	1
(2)	3,10,32	(2)	1
(3)	3,10,32	(3)	1
(4)	3,10,32	(4)	1
(d) (1)	3,32	22(c) (1)	1
(2)	3,32	(2)	1
(3)	3,32	(3)	1
(e)	3,32	22(d)	1FN 5
(f)	3,32	22(e)	1
(g)	3,32	22(f)	1
124.46	3,32	23FN 1	2
124.47	3,32	24FN 1	2
1=authority present 2=no regulation required		3=specific regulation needed 4=statutory change needed	

# EVALUATION OF HAWAII LEGAL AUTHORITY FOR NPDES PURPOSES

Federal Requirement 40 CFR §	Hawaii Authority Act 100 §	Public Health Regulations Chapter 37 §	Comment
124.51	3,6(c),33	15	1
124.52(a)	3,32	25(a)	1
(b)(1)	3,32	25(b)(1) FN 1	2
(2)	3,32	(2) FN 1	2
(3)	3,32	(3) FN 1	2
(c)	3,32	25(c) FN 1	2
(d)	3,32	(d) FN 1	2
124.61(a)	3,32	26(a)	1
(b)(i)	3,32	26(b)(i)	1
(ii)	3,32	(ii)	1
(a)	3,32	26(b)(ii)(A)	1
(b)	3,32	(B)	1
(c)	3,32	(C)	1
(d)	3,32	(D)	1
(c)		26(c)	1
124.62(a)	3,32	27(a) FN 1	2
(b)	3,32	(b) FN 1	2
(c)	3,32	(c) FN 1	2
124.63	3,32	28	1
124.64	3,32	29	1
124.71(a)(1)	3,32	-	3
(2)	3,32	-	3
(3)	3,32	-	3
(b)	3,32	-	2
(c)	3,32	-	3
1=authority present 2=no regulation required		3=specific regulation needed 4=statutory change needed	

# EVALUATION OF HAWAII LEGAL AUTHORITY FOR VARIOUS PURPOSES

Federal Requirement 40 CFR §	Hawaii Authority Act 100 §	Public Health Regulations Chapter 37 §	Comment
124.72(a) (b)	3,6,32	16(a) FN 1 16(a)	1 FN 6 2
124.73(a) (b) (c) (d) (e) (f) (g) (h)	8,10,11 9 12 3,10,32 8,11 11 11 11	- - - 22,33 - - - -	1 FN 7 1 1 FN 8 1 1 FN 9 1 FN 10 1 FN 11 1
129.80(a) (b) (c) (d)	3,31(6),32 3,31(6),32 3,31(6),32 -	- 3,4,15 - -	2 1 2 2
124.91(a) (b)	3,32 -	- -	2 2
124.92(a) (b) (c) (d)	3,10,32 3,10,32 3,10,32 3,10,32	22(b) 22(b) 22(b) 22(b)	3 3 3 3
124.93	-	-	FN 12
124.94(a) (b) (c) (d) (e)	§35	32(a) (b) (c) (d) (e)	1 1 1 1 1
1=authority present 2=no regulation required		3=specific regulation needed 4=statutory change needed	

## HAWAII FOOTNOTES

FN 1

Although no state regulations are required by this portion of Part 40, Hawaii has passed regulations on point.

Those regulations are listed in this review for informational purposes.

FN 2

40 CFR 124.41 speaks in terms of absolute prohibition when it says that a "State...shall insure that no permit shall be issued authorizing any of the following discharges." The scheme of chapter 37 § 15(c) is discretionary: "The Director may deny an NPDES application...if the discharge is one of the following."

The Hawaiian regulation must be brought to the level of total prohibition on this point.

FN 3

40 CFR 124.42(b) does not require a specific State regulation. However this section does define acts which the Director must do.

Hawaii has limited the Directors' statement (required by 40 CFR 124.42 in cases where limitations and standards of subparagraphs -(1)-(7) are applied) to those cases occurring under subparagraphs (1)-(3).

The Director must be able to act in full compliance with the requirements of 40 CFR 124.42(b). If Hawaii believes that 19(b) is a limitation on his power it should pass a regulation fully implementing 124.42(b).

Alternatively, Hawaii could strike 19(b) from chapter 37 as 124.42(b) does not require a State regulation.

The situation at present, with a regulation which partially implements the Federal solution, is potentially confusing.

FN 4

40 CFR 124.45 requires that the modification, suspension or revocation provisions be "terms and conditions" of a permit. Chapter 37 §§ 16(a)(1), (2), & (4) provides the Director with a power to modify, suspend or revoke but do not incorporate these powers as "terms and conditions" of a permit. The regulations should accomplish such an incorporation.

FN 5

40 CFR 124.45(e) seems to require the industrial user to forward periodic notice to the permittee who in turn forwards the notice to the Director.

Chapter 15 § 22(d) requires the industrial user to forward notice to both the permittee and the Director but does not require the permittee to forward notice to the Director. I suggest that this deviation be corrected.

FN 6

40 CFR 124.72 requires the state to have procedures insuring that an NPDES permit can be modified, suspended or revoked for "failure or refusal of the permittee to carry out the requirements of § 124.45(c)" (allowing the Director to enter, inspect, monitor and sample premises and discharges). This insurance seems to be contained by implication in chapter 37 § 16(a)(1) (revocation for violation of condition) since § 22(b) makes allowing the Director to enter, inspect, monitor and sample a condition of such issued NPDES permit. It would be preferable for Hawaii to make this insurance explicit.

FN 7

Finding of "authority present" contingent on the interpretation that "a violation of this chapter or any rule or regulation made thereunder." As proscribed in sections 8, 11, & 12 of Act 100 would include violations of those limitations, standards, duties and requirements outlined in 124.73(a).

If this interpretation is incorrect, then Hawaii should pass a regulation specifically implementing 124.73(a)

FN 8

Finding of "authority present" is contingent on the interpretation that the phrase "any violation of this chapter or any rule or regulation made thereunder" as used in § 12 of Act 100 is, in context, substantially equivalent to "threatened or continuing violations of any NPDES permits or conditions" as used in 40 CFR 124.73(c).

If this interpretation is incorrect then Hawaii should pass a regulation specifically implementing 124.73(c).

FN 9

Finding of "authority present" contingent on the interpretation that "a violation of this chapter or any rule or regulation made thereunder." As proscribed



in sections 8, 11, & 12 of Act 100 would include violations of those limitations, standards, duties and requirements outlined in 124.73(f).

FN 10

Finding of "authority present" is contingent on the interpretation that the phrase "Part III of this chapter or any rule or regulation promulgated by the Director present to Part III of this chapter" as used in § 11(b) of Act 100 is, in context, substantially the same as "any effluent standards and limitations or water quality standards, ...any NPDES permit or term or condition thereof...any NPDES filing requirements" as used in 124.73(f).

If this interpretation is incorrect, then Hawaii should pass a regulation specifically implementing 124.73(f).

FN 11

Finding of "authority present" is contingent on the interpretation that the phrase "Part III of this chapter or any rule or regulation promulgated by the department pursuant to Part III of this chapter" as used in § 11(b) of Act 100 is, in context, substantially the same as "any person...knowingly mak(ing) any false statement, representation, or certification in any NPDES form or any notice or report required by the term and conditions of any issued NPDES permit or knowingly render(ing) inaccurate any monitoring device or method required to be maintained by the Director" as used in 124.73(g).

If this interpretation is incorrect, then Hawaii should pass a regulation specifically implementing 124.73(g).

FN 12

Does Hawaii have specific authority to have a 303(e) planning process?